



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE PLACE OF LOGIC IN THE LAW

IT is a curious fact that while critics and reformers of the law formerly used to take their stand on self-evident truths, and eternal principles of justice and reason, their appeal now is predominantly to vital needs, social welfare, the real or practical need of the times, etc. Those who believe law to be not an isolated island *in vacuo* but a province of the life we call civilization, occupying similar soil and subject to the same change of intellectual season as the other provinces, will see in the fact noted above nothing but an indication of the general passing out of fashion of the old rationalism or intellectualism.

The seed of the protest against the over-emphasis of the logical element in the law was planted by Von Jhering and Justice Holmes over a generation ago.¹ But legal science in this country was then so far behind that of Germany that the logical elaboration and systematization of the law embodied in the work of Langdell and Ames proved the more pressing need and obtained the right of way. But there are many indications that the forces of anti-intellectualism are now rising in American legal thought, and they are sure to find powerful support in the public impatience with legal technicalities.

Imitators or followers seldom possess the many-sided catholicity of the pioneer or master. Thus Von Jhering and Justice Holmes, while emphasizing other factors, by no means deny all importance to legal logic. A large part of Von Jhering's "*Geist*"² is devoted to a logical analysis of the method and general ideas of the law; and Justice Holmes is careful to emphasize the function of general ideas in the development of the law (*e. g.*, the idea of identity in succession after death and *inter vivos*),³ and his book abounds in illustrations of how difficult legal problems can be cleared up by just logical analyses.⁴ But the new, more zealous crusaders against

¹ VON JHERING, *GEIST D. RÖM. RECHT*, iii, § 69. SCHERZ U. ERNST, ch. 1 and pts. iii and iv. HOLMES, *COMMON LAW*, ch. 1.

² §§ 44-46, 59-68, and esp. §§ 45, 64, 65.

³ *THE COMMON LAW*, ch. x. Note the quotation at the end of the preface, and the important place of "reasons" in the development of the law, pp. 5, 36.

⁴ See especially pp. 214, 219, 220, 239, 289.

legal ideology are less cautious, and are inclined to deny all value to logic and general principles.⁵ Now it is a rather simple task to show the inadequacies of the proposed substitutes for the traditional principles of legal science. Sound common sense, the lessons of experience, the unspoiled sense of justice, the teachings of the as yet to be established science of sociology, or the somewhat elusive and perhaps altogether mythical will of the dominant class, cannot, without the aid of a logical legal technique, help us elaborate the laws of gifts, sales, mortgages, or determine the precise liability of a railroad company to those who use its sleeping car service. It is also easy enough to refute these new crusaders out of their own mouths and show that they themselves attach great value to a clear and logically consistent elaboration of the law.⁶ But such easy refutations, while they may be just, are seldom illuminating, unless we examine the situation with some thoroughness. This may lead us into the supposedly foreign fields of logic and metaphysics. But at the time when the foundations of our legal system are questioned both inside and outside of the legal fraternity, it would be only the wisdom of the ostrich which would counsel us to refrain from entering into these fields because, forsooth, the old tradition says that law is law, and has nothing to do with any other field of human inquiry. It may be reassuring to orthodox legal scholarship to note that the foremost representatives of the exact and natural sciences have now outgrown the childish fear of metaphysics as the intellectual boggy — witness the writings of Russell, Poincaré, Duhem, Ostwald, and Driesch.

I

A suggestive parallel can be drawn between the functions of the law and of natural science. Both facilitate transactions by increasing our reliance on the future. We build our modern houses, bridges, and machinery because science makes us more certain that these structures will withstand the variations of pressure, etc. We enter into business because we expect that people will continue to

⁵ WÜSTENDORFER, *DIE DEUTSCHE RECHTSPRECHUNG*, 223; FUCHS, *DIE GEMEINSCHÄDLICHKEIT DER KONSTRUKTIVEN JURISPRUDENZ*, chs. i and ii; BENTLEY, *THE PROCESS OF GOVERNMENT*, ch. i, and BROOKS ADAMS, *CENTRALIZATION AND THE LAW*, lectures i and ii.

⁶ *CENTRALIZATION AND THE LAW*, 39, 41, 43; WÜSTENDORFER, 219-222.

desire certain commodities, and we count on the state to continue to protect us against robbery. We sell on credit not only because we expect that most people will be moved (by habit or conscience) to pay, but also because the law provides us with a machinery for collecting what is due. If our debtors also know that this machinery exists, they will pay more readily and the expense of using this legal machinery will be accordingly reduced. That the law should be readily knowable is, thus, essential to its usefulness. So far is this true that there are many inconveniences or injustices in the law which men would rather suffer than be paralyzed in their action by uncertainty. Primitive law, *i. e.*, all legal systems uninfluenced by Greek science, try to achieve this certainty by fixed rules or dooms enumerating specific actions and their consequences, just as they store up wisdom in isolated saws or proverbs. Clearly the multitudinous and complicated relations of modern life could not possibly be regulated by such a method. Like the classical Romans, we utilize, instead, that most wonderful discovery, or invention, of the Greeks—rational deductive system. We try to reduce the law to the smallest number of general principles from which all possible cases can be reached, just as we try to reduce our knowledge of nature to a deductive mathematical system. This rational form also gives the law the appearance of complete freedom from arbitrary will and thus satisfies the modern demand for equality in the enforcement of law.⁷

The law, of course, never succeeds in becoming a completely deductive system. It does not even succeed in becoming completely consistent. But the effort to assume the form of a deductive system underlies all constructive legal scholarship. In our own day, for instance, Thayer's general views on evidence and Wigmore's classical treatise on the subject have transformed a conglomeration of disconnected rules into something like a system. Ames' doctrine of unjust enrichment has brought together a number of artificially tacked on appendages to the law of contract into the somewhat coherent body of law known as quasi-contract. Forty years ago we had so little of a general theory of torts that if anyone had thought of writing a treatise on the subject he might simply have treated of a number of torts in alphabetic order. To-day we have

⁷ "Arbitrary discretion is excluded by the certainty resulting from a strict scientific method." SAVIGNY, VOCATION OF OUR AGE, p. 151.

not only a general theory of liability, but there is a marked tendency to make the law of torts and the law of contracts branches of the law of obligations. This effort at generalization and system has always been the task of the jurist. We use the notions of property, contract, or obligation so often now that we are apt to think that they are "as old as the law itself." But legal history shows clearly enough that the notion of property came as a result of a long process of unification of diverse laws against robbery. A great deal of material had to be eliminated before the abstract idea of property could be extracted. The idea of contract is so late that even as developed a legal system as the Roman had no general law of contract, but merely laws of *stipulatio*, *depositum*, *pignus*, *locatio conductio*, etc. The notion of possession seems to the classical jurists simply one of fact. But the possessory remedies did not originate in the principle of possession but rather in a number of diverse situations.⁸

In thus endeavoring to make the law systematic, jurists are not merely pursuing their own purely theoretic or scientific interest. They are performing a duty to the community by thus transforming the law. A legal system that works with general principles has powerful instruments. Just as the generalized arithmetic which we call advanced mathematics has increased manifold our power of solving physical problems, so a generalized jurisprudence enlarges the law's control over the diversity of legal situations. It is like fishing with large nets instead of with single lines.

As nature has other cares besides letting us paint her deductive charm, she constantly reveals aspects that hamper or complicate our beautiful analytic equations. So, also, the affairs of practical life generate situations which mock our well-intentioned efforts to reduce the law to a rational system. In the presence of these, as of other seemingly insurmountable obstacles, human frailty is tempted to blink at the difficulties. So urgent is the need for assured first principles that most people resent the service which the skeptical-minded — the stray dogs of the intellectual world — render by showing the uninhabitableness of our hastily constructed legal or philosophic kennels. In the legal field, the blinking at the practical difficulties is facilitated by the ready assurance that if our principles are just it is none of our fault if any inconvenience re-

⁸ DERNBURG, RÖM. RECHT, § 220.

sults. *Fiat justitia pereat mundus*, is a very edifying excuse for refusing to reëxamine our principles in the light of the harsh results to which they lead.

According to the prevailing popular theory — a theory for which popular philosophy is largely indebted to a famous lawyer, Francis Bacon — facts are “out there” in nature and absolutely rigid, while principles are somewhere “in the mind” under our scalps and changeable at will. According to this view scientific theories are made to fit preëxisting facts somewhat as clothes are made to fit people. A single inconsistent fact, and the whole theory is abandoned. Actually, however, facts are not so rigid and theories not so flexible; and when the two do not fit, the process of adaptation is a bilateral one. When new facts come up inconsistent with previous theories, we do not give up the latter, but modify both the facts and the theory by the introduction of new distinctions or of hypothetical elements. If the facts of radiation do not fit in with the theory of the conservation of energy, an ether is invented and endowed with just as many properties as are necessary to effect a reconciliation, though in the end this results in inordinate complexity. Similarly legal theories, attempting to assimilate new facts by stretching old rules and introducing distinctions and fictions, become so complex and full of arbitrary elements that the very end of legal system is thereby defeated. It is artificial complexity rather than inconsistency with facts that caused the abandonment of the Ptolemaic astronomy and is causing the abandonment of the physics of the ether to-day. The classical system of common-law pleading, based on a few self-evident principles, was just such a system. It fell precisely because, as the forms of actions expanded to include the new industrial order, the system became so choked with artificial distinctions and fictions that a conservative and long-suffering people had to sweep it all away. Similarly has the law of employers' liability, based on a simple principle — no responsibility without fault — grown to such monstrous complexity (witness Labat's voluminous book) that legislation is sweeping it away.

The above parallel between natural science and legal system should, of course, be corrected by noting the important differences between the two. Legal principles are not so simple or so readily applicable to single cases as are the principles of physics; nor are the facts of the legal order so definite and so rigid as those of the

physical order. Crucial experiments are possible in science. Single experiments have sometimes caused such difficulties to reigning theories as to lead to their ultimate abandonment. The facts of physics admit of description in terms of number and can be indefinitely repeated, whereas the facts of the legal order, "practices," or decisions, can always be condemned and disregarded as wrong in principle. Nevertheless, enough has been said above to indicate that the rôle of deduction is not an accidental incident in law and natural science but is rather an essential part of their life.

II

In modern times the widespread opinion has grown up that deduction is incapable of genuinely extending our knowledge and can serve at best only as an ornament of exposition. It is sometimes thought that the introduction of the "case method" in law teaching marks the entrance of inductive scientific methods in law. The latter view is, however, obviously a misapprehension. Both Langdell and Ames regarded the case method as a sound pedagogic device, but in no way doubted the existence of legal principles according to which cases should be decided. Langdell even asserted that the number of such principles is very small.⁹ It is from an entirely different quarter that the whole of traditional legal science has, because of this very belief in principles, been attacked as scholastic and out of harmony with the methods of modern science.¹⁰ Whatever may be these critics' knowledge of modern science, they certainly have a very vague idea of Scholasticism, and use the term as a *locus* for all that is intellectually undesirable, a sort of inferno for all ideas to which they are opposed. Now there is one virtue which no one who has ever read Aquinas or Duns Scotus denies them, and that is clarity and consistency — a virtue which, if not sufficient for admission into the modern juristic heaven, is at least not to be altogether despised. Moreover, every student of the history of thought knows that the contrast between modern science and medieval philosophy is not to be dismissed by the mere shibboleth of induction or deduction. The founders of modern science — Copernicus, Kepler, Galileo, Huygens, Descartes, and Newton — cer-

⁹ Preface to the first case book on Contracts.

¹⁰ BOZI, *DIE WELTANSCHAUUNG DER JURISPRUDENZ*, and BROOKS ADAMS and BENTLEY, *op. cit.* See also note in JUNG, *DAS PROBLEM DES NATÜRLICHEN RECHTS*, p. 172.

tainly did not despise deduction. The history of science completely belies the dogma as to the fruitlessness of deduction, and shows many important physical discoveries, such as Maxwell's discovery of the electro-magnetic character of light, brought about by deductive or mathematical procedure. The great apostle of induction was Bacon — a good lawyer, trained in the handling of cases in the Inns of Court, but one who made no contribution at all to any natural science.¹¹ The present apotheosis of induction arose in the middle of the nineteenth century as a result of a violent reaction against the frenzied excesses brought about by the classical German philosophies of Fichte, Hegel, and Schelling. It became a dogma of popular philosophy through the popularity of Mill's "Logic". Now Mill was not himself a scientist. He was an administrator — an official of the East India Company — and his acquaintance with natural science was gathered from such second-hand sources as Whewell's "History of the Inductive Sciences". But so strong has become the hold of Mill's simple formulæ on popular thought that even men of science have accepted his account of scientific method — which is not surprising if we remember that healthy men or athletes are not necessarily good physiologists or trainers. The actual procedure, however, of natural as well as of legal science involves constant reliance on principles, and is incompatible with Mill's nominalism, *i. e.*, the assumption that only particulars exist in nature.

It may seem a bold and reckless statement to assert that an adequate discussion of cases like *Berry v. Donovan*,¹² *Adair v. United States*¹³ or *Commonwealth v. Boston and Maine R.*,¹⁴ involves the whole medieval controversy over the reality of universals. And yet, the confident assertion of "immutable principles of justice inhering in the very idea of free government" made by the writers of these decisions,¹⁵ and the equally confident assertion of their critics that there are no such principles,¹⁶ show how impossible it is to

¹¹ Harvey, the discoverer of the circulation of the blood, said of Bacon: "He writes science like a Lord Chancellor."

¹² 188 Mass. 353, 74 N. E. 603 (1905).

¹³ 208 U. S. 161 (1907).

¹⁴ 222 Mass. 206, 110 N. E. 264 (1915).

¹⁵ *Twining v. N. J.*, 211 U. S. 102 (1908).

¹⁶ CENTRALIZATION AND THE LAW, pp. 20 ff. Dean Lewis in 61 U. OF PA. L. REV., 531, 533. 1913.

keep out of metaphysics. Can we dodge the question by saying that while legal principles are unchanging the law is a practical or progressive science?¹⁷ How can a principle or undisputed formula remain the same if all the cases to which it is to be applied are constantly changing?¹⁸ You may decide to enter the realm of metaphysics or not, just as you may decide to go to church or not; but you cannot deny that an intelligent decision in either case demands considerable thought.

The matter is not very difficult if we refuse to be browbeaten by a word like "reality," which perhaps represents nothing definite except a certain emotional afflatus. It ought to be quite clear that abstractions and universals exist in every sense in which individual things can be said to exist, and by the same evidence. If any statement like, "Smith is white and an honest man" is true, whiteness, honesty, and manhood must exist as truly as Smith. Similarly, if it is true that one body is equal to, greater than, or less than another, the relations of equality, greater than, or less than, exist just as truly as the bodies between which they hold. If the results of logical and mathematical reasoning are observed to hold true of nature, it seems more proper to say that nature is logical and mathematical than to suppose that logical and mathematical principles are just words having no meaning in nature, or that they have a dubious existence "in the mind only" (the "mind" being conceived as outside of nature). The difficulty which most people have in conceiving of the existence of universals is due to the tendency to *reify* all relations, *i. e.*, to think of these relations or universals as if they were themselves additional *things*, instead of what they are defined to be, *viz.*, qualities or relations of things. This shows itself in the naïve question, "*Where* do these universals exist?" as if universals were particular entities occupying space. In brief, it seems that the actual procedure of natural and legal science demands the doctrine that universals do exist, but that they exist as universals, not as additional individual things. Surely a barren if somewhat truistic doctrine, you may say. But the following may show that it offers us a clew whereby to distinguish the use from the abuse of logic in the law.

¹⁷ National Protection Association v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902).

¹⁸ Professor Frankfurter in 29 HARV. L. REV. 369.

III

Every science must use logic to test whether certain conclusions do follow from given premises. But that which distinguishes one science from another, *e. g.*, law from physical chemistry, is the subject-matter, the axioms and postulates from which conclusions are drawn. The subject-matter of the law is the regulation of the conduct of individuals living in those more or less permanent relations which we call society. Now, from the point of view of logic the existence of men in society or their desire to regulate their mutual relations is just as brute an empirical fact as that water expands when cooled near the freezing point. All metaphysical philosophies of law, like Stammler's, which pretend to have no empirical elements at their basis, thus really attempt the logically impossible. You cannot construct a building merely out of the rules of architecture. As a matter of fact, all metaphysical philosophies of law do smuggle in, in more or less disguised form, the main material facts of the social order. In this they are assisted by a fact that empiricists — especially those intoxicated with the doctrine of evolution — do not fully realize, *viz.*, the large fund of common humanity possessed by all peoples whose history we can study. Private law especially deals with those traits of human nature that have changed least in the comparatively short period that is covered by the whole of legal history. Our history "starts with man full grown. It may be assumed that the earliest barbarian whose practices are to be considered had a good many of the same feelings and passions as ourselves."¹⁹ Thus is explained the paradoxical fact that metaphysical philosophers of law, who try to ignore or rise high above the factual order, are frequently more productive of genuine social insight than those who are lost in the multitudinous but unimportant details of historic or ethnologic jurisprudence.

The law, at any given time, is administered and expounded by men who cannot help taking for granted the prevalent ideas and attitudes of the community in which they live. Even if it were logically, it would certainly not be psychically, possible for any man to think out an absolutely new system of jural relations. The law reformer who urges the most radical change, can justify his pro-

¹⁹ HOLMES, COMMON LAW, p. 2.

posals only by appealing to some actually prevailing idea as to what is desirable; and the history of the law shows how comparatively small is the addition or subtraction to the system of jural concepts and ideas that the most creative judges and jurists have been able to bring about. There are, therefore, first or fundamental principles of the law which may be regarded as practically or *quasi a priori*. But though we cannot avoid relying on principles, the complex and constantly changing subject-matter requires continuous caution and a humbly open mind to the dangers of the eternal tendency of all intellectual effort in the direction of oversimplification.

Among the first principles of the law there are at least two kinds: (1) axioms or fundamental assumptions (*a*) as to fact, *e. g.*, that men desire their economic advantage, and are deterred from actions to which penalties are attached, and (*b*) as to the aim of the law, *e. g.*, that property should be protected, that men should be equal before the law, etc.; and (2) postulates which are really ways of procedure or methods of analysis and construction, *e. g.*, the distinction between rights and duties, or between law and equity, the principle that no man can be his own agent, or that no man can convey more or a greater estate than that which in law he has. The abuse of first principles of the first class consists in setting up economic or political maxims of public policy, which are at best applicable only to a given period or historical economic system, as eternal principles for all times. Examples of this may be found in the use of the principle that the public interest always demands competition, a free market, and an open shop, and the maxim that only by the separation of powers, checks and balances, and judicial control over legislation can liberty be maintained. The fallacy of regarding these as eternal first principles is readily detected and has been frequently pointed out in recent times. The fallacy, however, of setting up what I have called above postulates, as eternal necessities of all legal system, is less easily detected. These postulates have the appearance of self-evident truths. But physics has learnt to regret accepting such seemingly self-evident propositions as that a thing cannot act where it is not, and modern mathematics has learned that such seemingly self-evident assertions as that the whole is greater than a part, or Euclid's parallel postulate, are not necessarily true. The theoretical sciences now select their funda-

mental propositions not because of self-evidence, but because of the system of consequences that follows from them, and a practical science like the law ought not to despise that procedure.

The abuse of self-evident principles is at the basis of what the Germans call *Begriffsjurisprudenz*, which Professor Pound calls "mechanical jurisprudence",²⁰ and also of that which is unsatisfactory in the old natural law. The analysis of a few additional examples may perhaps make my point clearer.

In discussing creditors' bills in equity, Langdell says:²¹ "Indeed, when a debtor dies, his debts would all die with him, did not positive law *interpose* to keep them alive; for every debt is created by means of an obligation imposed upon the debtor, and it is *impossible* that an obligation should continue to exist after the obligor had ceased to exist." I have italicized the words "interpose" and "impossible" because these and the later expression that the question is "as old as the law itself" bring into relief the underlying view that the law itself is a logical system in which it is forever impossible for a debt to survive the debtor. But if that were so, how could positive law bring about the impossible? Could positive law change the rules of arithmetic, or make the diagonal and the side of a square commensurate? In point of fact the principle in question is not logically necessary at all. It arose at a time when the creditor could dispose of the actual body and life of the defaulting debtor, hence the relation between debtor and creditor could have been entered only by people who personally trusted each other. If the law of the XII Tables had allowed an assignment of a debt, it would have been socially as serious as if our law allowed an assignment of marital rights. Later on, when the rigor of the old law was softened, the practical reason why the creditor might not be replaced by another person disappeared, and the debtor-creditor relation became depersonalized at one end. The difficulties in the way of depersonalization at the other end were not the logical but the practical ones of harmonizing the security of credit and the maintenance of family continuity on the basis of inheritance. But habits of legal thought in regard to the personal character of the debtor-creditor relation still produce the familiar difficulties of subrogation, etc.

²⁰ Pound, *Mechanical Jurisprudence*, 8 COL. L. REV. 605, KORKUNOV, *THE GENERAL THEORY OF LAW*, § 15, and BEKKER, *ERNST UND SCHERZ*, ch. vii.

²¹ *BRIEF SURVEY OF EQUITY JURISPRUDENCE*, p. 126.

Another illuminating instance of the confusion between actually existent and logically necessary rules of law is to be found in that most sagacious of the great practical Roman jurists, Papinian. The *post-liminium*, as is well known, was instituted to the end that citizens might not have their civil rights diminished because of unavoidable absence due to state service. Now, if one, before acquiring title by *usus*, is captured by the enemy, should possession be restored to him? No, says Ulpian,²² "for possession is for the most part a matter of fact, and matter of fact is not included in the scope of *post-liminio*." The reasoning here seems conclusive. The law can restore old rights, it cannot restore past states of fact. Reflection, however, shows that while this limitation on the right of *post-liminio* may have been practically wise, it was by no means logically necessary. An affirmative answer to the question would not have attempted to restore the past but would merely have terminated or wiped out rights acquired by others through the applicant's capture. "Nor ought the applicant," continues Papinian,²³ "to be allowed an *utilis actio*, as it is very unjust to take a thing away from an owner where there was no *usus* that took it away; a thing *cannot* be regarded as lost where it was not taken out of the hands of the party who is said to have lost it." This *cannot*, however, is not at all convincing when we remember that in the same book it is laid down²⁴ that "soldiers being quartered in Rome are treated as being absent on state service."

Shall we, then, give up all reliance on principles? That would be as wise as giving up the use of our eyes because they are, as a matter of fact, poor optical instruments. Just as a scientific optics aims at correcting our vision through the determination of the natural error of myopia or astigmatism, so a scientific jurisprudence makes such natural principles as "one cannot convey more than in law he has," or "no rights can be acquired by the commission of wrong," more useful by showing their necessary limitations.

Closely connected with the use and abuse of first principles is the use of artificial concepts or abstractions in the law. Von Jhering has long ago pointed out²⁵ that juristic technique is able to reconstruct and simplify the law by a process of analysis similar to the

²² DIGEST IV 6, 19.

²³ *Ibid.*, IV 6, 20.

²⁴ *Ibid.*, IV, 6, 7.

²⁵ GEIST D. RÖM. RECHT, § 44.

process whereby, in the course of history, language becomes represented by a more or less phonetic alphabet. The natural unit of language is the sentence, represented in primitive form by pictures. By a process of abstraction we pass from that stage in which thousands of signs are needed to the stage where a few simple phonetic elements suffice to reproduce all the possible combinations of language. Just so, scientific jurisprudence endeavors to analyze all laws as combinations of a few recurrent simple elements. From this point of view, the artificiality of legal concepts is not an objection to their employment. Indeed, there is an advantage in purely artificial symbols. They carry with them only the amount of meaning contained in their definition, without the intellectual and emotional penumbra that more familiar terms always drag with them. The most dangerous concepts of the law are those like direct tax, republican form of government, interstate commerce, restraint of trade, and the like. They seem to be definite in themselves, but when we come to apply them, they prove most illusive. The law, for instance, says, "no taxation except for public purposes." What are public purposes? The courts have ruled that municipalities may give bounties to grist mills and railroads, but not to factories. Communities may sell gas and electricity, but not coal; may abate a dam for the relief of privately owned meadows, but may not lend money for rebuilding a burnt district.²⁶ The lines of distinction seem quite arbitrary; and when judges try to defend them by such distinctions as that between direct and incidental benefits to the community, a logician cannot help feeling that the decisions may be good but the reasons certainly bad. It is the pernicious fiction that judges never make the law but only declare "the will of the legislator" that makes people blink at the essential indefiniteness of concepts like "due process of law" or "interstate commerce," and pretend to believe that all the constitutional law on these subjects is deduced from the few words of the constitutional enactments. The real work of judicial interpretation is precisely that of *making* these concepts definite by fixing their limits as questions about them come up.

Underlying the logical use of concepts are, of course, the logical

²⁶ *Rogers v. Burlington*, 3 Wall. (U. S.) 654 (1865). *Parkersbury v. Brown*, 106 U. S. 487 (1882). *Opinion of the Justices*, 150 Mass. 592, 24 N. E. 1084 (1890). *Lowell v. Boston*, 111 Mass. 454 (1873).

rules of division, such as the one which demands that subdivisions shall be mutually exclusive. As the law has its excuse for being in the need to regulate future conduct, it must express itself in terms which will exclude the possibility of a case falling in both or neither of two classes which it may set up. Jurists, however, have not paid attention to the difference between logical division and natural classification. The naturalist who studies vertebrates finds that the multitudinous and widely different species may be grouped into fishes, reptiles, etc. If each of these groups has some important trait, the classification will be satisfactory to the naturalist, even though it does not rule out the possibility of species being discovered on the borderland, betwixt and between the groups distinguished. The distinction between plants and animals is a useful one even though there are many species to which either term may be applied. The law oscillates between natural classification and logical division and readily throws the incautious jurist into confusion. In enforcing constitutional provision for "the equal protection of the laws," courts soon realize that an abstract equality, regardless of all differences such as age, sex, occupation, mode of life, etc., would render the law absurd. The courts, then, are forced to recognize the existence of natural classes. But having recognized these natural classes, the prevailing logic of the law compels courts to view them as if they were absolutely logical divisions. The consequent difficulties are amply illustrated in the chapters of Professor Freund's book on the "Police Power."

The difficulty of foisting an absolutely logical division upon the facts (or pretending to find them in nature) is illustrated in the usual classification of rights and wrongs. Let us take Langdell's as an illustration. His classification presupposes an absolute distinction between rights and duties. This distinction is not defended. It seems to be based simply on the idea of advantage and disadvantage. May there not be legal relations which can just as well be called rights as duties? Some of the very onerous rights of trustees come very near being of that type. Further Langdell says:²⁷ "Absolute rights are either personal rights or rights of property. Every personal right is born with the person to whom it belongs, and dies with him. Personal rights, therefore, can neither be acquired nor parted with, and hence they are never the subjects of commerce,

²⁷ *Op. cit.*, 220.

nor have they any pecuniary value." But though "we can neither number them nor define them," there is one that is specifically mentioned, *viz.*, "the equal right of all persons to use public highways, navigable waters, and the high seas." Shall we, however, say that an expressman or shipowner cannot sell his right to do business on a given route or river? How does the right to use a navigable river differ from the right to buy and sell liquor or to serve people as an innkeeper? I have no doubt that Langdell's classification of rights and wrongs is useful in helping us to analyze many actual situations, and the difficulties I am raising can probably be met by introducing additional subtle distinctions. But the above considerations indicate that we are not dealing here with an absolutely accurate description. The difference between a useful approximation and an absolutely accurate description is of practical as well as of logical importance. If our classification is only approximate, we must apply it cautiously, expecting some day to come across actual cases which it will not fit, and where practical injustice will result from the attempt to *make* the facts fit our preconceived account.

The various instances of the abuse of legal logic adduced by writers like Von Jhering, Korkunov, Demogue, and Pound, are all cases of an overhasty application of logic to a complex material and do not, of course, show the breakdown of logic itself. Nevertheless, it is fair to add that a great many of the difficulties are due to the inadequacies of the Aristotelian account of logic, which up to recently was the only one in the field. The Aristotelian logic, with its subject-predicate doctrine, is primarily a logic of subsumption and applies best to a system like the biology of which Aristotle was a master, *viz.*, a system of fixed classes. It is only modern logic that can deal adequately with a changing system, since modern logic, like modern mathematics, deals with the invariant rules governing possible transformations.

The limitation which underlies the old Aristotelian logic shows itself in the familiar difficulty as to the presence of discretion in the law. The law is primarily directed toward certainty, which, according to the classical view, can be produced only by definite rules that leave no room for individual discretion. Individual discretion, whether of judge or of legislator acting under constitutionally limited powers, appears to this view synonymous with the absence of law. Thus in the criminal law the old maxim is, *fix the offense*

definitely and the definite penalty. To individualize punishment seems to the old view to abandon legal security and to open the floodgates of judicial arbitrariness. This view, however, is based on an inadequate logic which fails to appreciate the necessarily provisional character of all legal classification and the consequent necessity of discretion to make definite that which would otherwise be really indefinite. Logically the task of the law is similar to that of the wholesale manufacturer of shoes or any similar commodity. Human feet vary in size, and perhaps there is truth in the saying that no two are exactly alike. On the assumption that the shoe should fit the foot, the theoretical consequence would be that no two shoes should be made exactly alike. Experience, however, without contradicting these postulates of the perfect art of shoemaking, finds that a limited number of classes of "sizes" will satisfy all normal demands. How is the number of these "sizes" determined? Obviously by striking a balance between the (very slight) inconvenience of having a shoe that may be one sixteenth of an inch too long and the inconvenience of doubling or tripling the number of sizes. The same method is at the basis of the criminal law. The number of ways and circumstances, for instance, in which the life of one person can be destroyed by another is endless. What the law does is to group them into a small number of classes, *viz.*, murder, homicide, manslaughter, etc., attempting to define the characteristics of each type in such a way that no one can take the life of a fellow-being in a way that society disapproves without falling in one or other of these groups. There is, of course, no logical reason why the division into groups should be so rough, and it is abstractly possible to carry the classification to any degree of fineness and discrimination, — except that the difficulty of making juries understand the difference between murder in the second degree and manslaughter is already sufficiently great. It is foolish to attempt results more delicate than the instruments at your disposal will permit. Would we attempt to carve a delicately featured wooden statue with an ax? Judicial discretion in the individualization of punishment is simply an attempt to bring into the penal machinery a greater degree of discrimination than is practically possible by the prescription of hard and fast general rules.

The same argument applies to legislative discretion. "If the legislature has power to fix the maximum number of hours in an

industry to ten, then why not nine, etc.? Where are you going to draw the line?" The answer is that no such line can be drawn *a priori*, since we are dealing with a line that must necessarily vary in different industries and at different times.

Jurists, like other men, are in their attitude to the employment of logic either intellectualists or mystics. The intellectualist not only trusts implicitly all the results of reasoning, but believes that no safe result can be obtained in any other way. Hence in law he emphasizes the rule rather than the decision. This, however, leads to an ignoring of the absurd consequences to which the logical application of rules frequently leads. *Summa jus summa injuria*. The mystics distrust reasoning. They have faith in intuition, sense, or feeling. "Men are wiser than they know," says Emerson, and the Autocrat of the Breakfast Table, who was not a stranger to the study of the law, adds, "You can hire logic, in the shape of a lawyer, to prove anything that you want to prove." But shall we subscribe to the primitive superstition that only the frenzied and the mentally beclouded are divinely inspired? Like other useful instruments, logic is very dangerous, and it requires great wisdom to use it properly. A logical science of law can help us digest our legal material, but we must get our food before we can digest it. The law draws its sap from feelings of justice and social need. It has grown and been improved by sensitively minded judges attending to the conflicting claims of the various interests before them, and leaving it to subsequent developments to demonstrate the full wisdom or unwisdom of the decision. The intellectualist would have the judge certain of everything before deciding, but this is impossible. Like other human efforts, the law must experiment, which always involves a leap into the dark future. But for that very reason the judge's *feelings* as to right and wrong must be logically and scientifically trained. The trained mind sees in a flash of intuition that which the untrained mind can succeed in seeing only after painfully treading many steps. They who scorn the idea of the judge as a logical automaton are apt to fall into the opposite error of exaggerating as irresistible the force of bias or prejudice. But the judge who realizes that all men are biased before listening to a case, is more likely to make a conscientious effort at impartiality than one who believes that elevation to the bench makes him at once an organ of infallible logical truth.

A good deal of the wisdom of life is apt to appear foolishness to a narrow logic. We urge our horse down hill and yet put the brake on the wheel — clearly a contradictory process to a logic too proud to learn from experience. But a genuinely scientific logic would see in this humble illustration a symbol of that measured straining in opposite directions which is the essence of that homely wisdom which makes life livable.

Morris R. Cohen.

COLLEGE OF THE CITY OF NEW YORK.